

5/28/53

~~CONFIDENTIAL SECURITY INFORMATION~~

Proposed State-Defense Draft of May 21, 1953

DRAFT INSTRUCTION TO AMERICAN EMBASSY IN TOKYO

No.

To the

Officer in Charge of the American Mission,

Tokyo.

The Secretary of State refers to the note of April 14, 1953 from the Japanese Minister of Foreign Affairs to the Ambassador concerning the revision of Article XVII of the Administrative Agreement upon the coming into force of the NATO Status of Forces Agreement.

In order to be prepared in the event of the ratification by the United States of the NATO Status of Forces Agreement, the Departments of State and Defense have drafted the following documents which are enclosed: (1) a note from the Ambassador to the Japanese Minister of Foreign Affairs, (2) proposals for changes in the Japanese draft Protocol to amend Article XVII and (3) proposals for official minutes regarding the Protocol. Any comments of the Embassy or the Command with respect to these documents should be telegraphed to the Department as soon as possible.

The Department is sending in a separate instruction recommendations for discussions with the Commonwealth representatives in Tokyo regarding the negotiation of the criminal jurisdiction provisions of the United Nations forces agreement.

\*State Department Declassification/Release Instructions on File\*

CONFIDENTIAL SECURITY INFORMATION

- 2 -

agreement. It should be made clear to the Japanese in some appropriate way from the commencement of the negotiations for revision of Article XVII of the Administrative Agreement that it is understood that the same criminal jurisdiction arrangements that are made applicable to United States forces including any formal or informal understandings with respect to procedures and to the waiver of the primary right to exercise jurisdiction will also be made applicable to the United Nations forces in Japan.

The Department believes that there are only two of the United States proposals which may cause difficulty. The first is the proposal to add to the Japanese draft Protocol a paragraph concerning suspension in the event of hostilities. The second involves the arrangement for the waiver by Japan of its primary right to exercise jurisdiction.

With reference to the proposed paragraph concerning suspension, the Embassy may wish to point out to the Japanese that the paragraph does not enable the United States, by unilateral action, to reestablish exclusive jurisdiction arrangements in the event of hostilities. Any revision of criminal jurisdiction arrangements would have to be made by agreement between the United States and Japan. The United States has declared its intention in the event of hostilities in the NATO countries to take steps to suspend Article VII of the NATO status of forces agreement so far as it is concerned and to seek exclusive jurisdiction in the NATO countries.

CONFIDENTIAL SECURITY INFORMATION

- 3 -

The proposed paragraph concerning suspension describes the circumstances under which the right of suspension may be exercised as "hostilities in the Japan area". This phrase includes, of course, armed attack upon Japan. It is also broad enough to include hostilities in the Ryukyus and other areas near to Japan. The Embassy may assure the Japanese that the United States does not intend to seek suspension of concurrent jurisdiction arrangements in Japan because of the present hostilities in Korea. It is assumed that concurrent jurisdiction arrangements will be implemented in such a way as to avoid any interference with the conduct of hostilities in Korea.

The phrase "Japan area" appears in Article IV of the Security Treaty and in Article XXIV of the Administrative Agreement. The Department would prefer to avoid any exact definition of the phrase and to leave its meaning to be worked out in the course of time whenever specific issues are raised.

It is desired that the Embassy seek the maximum waiver which can be obtained of the primary jurisdiction available to the Japanese Government under paragraph 3(c) of the draft Protocol. Preferably this should be public and take the form of a general waiver on the government level. It is recognized, however, that the approach used to the Japanese Government must not be such as would react unfavorably upon general United States-Japanese relations. It is further recognized that any effective approach

5/21/53

CONFIDENTIAL SECURITY INFORMATION

CONFIDENTIAL SECURITY INFORMATION

approach to obtaining such a waiver must take into consideration the extreme sensitivity of the Japanese to the exercise by any nation of extraterritoriality. Therefore, it is requested that the Embassy explore with the Japanese authorities the most effective method of obtaining a maximum waiver of primary jurisdiction.

If a general waiver seems unobtainable, the Embassy is requested to seek a qualified waiver of the type proposed in the minute regarding paragraph 3(c) of the Protocol. It is preferable that such a waiver arrangement be unclassified but if the Japanese are willing to agree to a more extensive waiver on a classified basis, then such an arrangement should be sought. While negotiations regarding the waiver are in progress, it is recommended that the Working Group on Procedural Details referred to in the Department's telegram No. 2649 of May 12 be established to consider practical methods of implementing a waiver so that, at the completion of the agreement, the Embassy will be satisfied that waiver arrangements will be truly effective in operation.

The United States is planning to seek arrangements with the NATO countries for the maximum appropriate waiver of local criminal jurisdiction without bearing unfavorably on general relations between the United States and the country concerned. United States Ambassadors in two NATO countries have already been authorized to seek waiver arrangements. The arrangements will be kept confidential. Because disclosure of the United States policy would prejudice general relations with the NATO countries and affect negotiations concerning the stationing

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CONFIDENTIAL SECURITY INFORMATION

of troops in Europe, it has been agreed that the only public reference to the policy "should be along lines that the United States is confident that operating arrangements based on good relations between governments and between our military authorities and local authorities abroad will provide in fact an even greater measure of protection than the satisfactory legal guarantees established by the NATO Status of Forces Agreement." Therefore, Japanese officials should be advised only in terms of the foregoing quotation unless the Embassy is convinced that a disclosure of the full data will be held strictly confidential by the Japanese officials concerned.

The Japanese Government may be unwilling to make a waiver of the type requested. In that event it may be possible to work out a waiver declaration along the lines of the Japanese proposal of September 1952. That proposal contemplated that Japan would normally waive jurisdiction over minor offences, but would normally exercise jurisdiction over major offences, such as murder, arson, assault resulting in death, robbery and rape. If such an arrangement were set forth in the minutes, the Japanese might be willing to give oral assurances that they will normally waive jurisdiction even over major offences.

In keeping with our policy with respect to the NATO countries, the aim of the Embassy should be to secure a waiver arrangement as authoritative and extensive as possible without bearing unfavorably on general United States-Japanese relations. The waiver proposal of the United States should not be presented as a demand, but as a request. The Embassy should use

CONFIDENTIAL SECURITY INFORMATION

- 6 -

United States bargaining strength in other matters.

The Department will inform the Ambassador in a subsequent instruction when it may present the enclosed documents to the Japanese Foreign Office and enter into discussions with the Japanese for the purpose of reaching agreement on the terms of the protocols regarding Article XVII and on the terms of official minutes regarding the Protocol.

Enclosures:

- (1) Draft note from Ambassador to Japanese Foreign Minister.
- (2) Draft United States proposals for changes in Japanese draft Protocol.
- (3) Draft United States proposals for official minutes regarding Protocol.

CONFIDENTIAL SECURITY INFORMATION

State-Defense draft

5/21/53

CONFIDENTIAL

DRAFT NOTE FROM UNITED STATES AMBASSADOR  
TO JAPANESE MINISTRY OF FOREIGN AFFAIRS

Excellency:

I have the honor to refer to your note of April 14, 1953 with which were enclosed a draft of a protocol on criminal jurisdiction and a draft of official minutes regarding the protocol which Japan proposes to conclude with the United States upon the coming into force of the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces.

On \_\_\_\_\_ the United States Senate gave its advice and consent to the ratification of the NATO Status of Forces Agreement.

Article XVIII of the agreement provides that thirty days after four signatory states have deposited their instruments of ratification the agreement shall come into force between them. France, Norway and Belgium have already deposited their ratifications. Consequently the NATO Status of Forces Agreement will come into force with respect to the United States thirty days after the deposit of the United States ratification.

My Government is prepared to use the draft of the protocol enclosed with your note of April 14, 1953 as the basis for negotiation of an agreement on criminal jurisdiction to be concluded immediately upon the coming into force of the NATO agreement. Proposals of my Government for changes in the draft protocol are enclosed. With respect to the official minutes my  
Government

CONFIDENTIAL

- 2 -

Government has prepared a draft which incorporates all except one of the Japanese proposals for the official minutes and which includes a number of additional proposals. My Government suggests that its draft, which is enclosed, be used as the basis for reaching an agreement on the official minutes.

In this connection my Government wishes to make clear its belief that the agreement ultimately concluded between the United States and Japan and the official minutes accompanying the agreement should also be made applicable to the United Nations forces in Japan through the agreement now under negotiation concerning the status of those forces.

Enclosures:

1. US proposals for changes in the draft protocol.
2. US draft of agreed official minutes regarding the protocol.

CONFIDENTIAL



CONFIDENTIAL

Proposed State-Defense Draft of May 21, 1953

UNITED STATES PROPOSALS FOR CHANGES IN THE DRAFT PROTOCOL  
TO AMEND ARTICLE XVII OF THE ADMINISTRATIVE AGREEMENT  
PROPOSED BY THE JAPANESE GOVERNMENT ON APRIL 14, 1953

- (1) In the first clause of the Protocol the phrase "is to come into force" should be changed to read "came into force".
- (2) In the third clause of the preamble the word "of" should be inserted between the words, "existing provisions" and the words "Article XVII", and the ending of the clause should be changed to read " . . . shall be abrogated and the following provisions shall be substituted:"
- (3) In paragraphs 1 and 2, the order of the (a) and (b) clauses should be reversed to conform with the NATO agreement.
- (4) In paragraph 1 and subsequent paragraphs the phrase "of the civilian component thereof" should be changed to read "the civilian component" to conform with other Articles of the Administrative Agreement.
- (5) In clause (a) of paragraph 3, the phrase "a member of the United States armed forces, or of the civilian component thereof" should be changed to read "a member of the United States armed forces, the civilian component or one of their dependents".

COMMENT: The above proposal would differ from the Japanese proposal only to the extent of making clear that the United States

military

CONFIDENTIAL

- 2 -

military authorities have the primary right to exercise jurisdiction over dependents for offences solely against United States property or the person or property of another member of the United States armed forces, the civilian component or a dependent. By virtue of paragraph 4 of the Protocol dependents over whom the United States might exercise jurisdiction do not include persons who are nationals of or ordinarily resident in Japan.

(6) In paragraph 5(c) the words "a suspect member" should be changed to read "an accused member" to conform with the NATO agreement.

(7) In paragraph 9(e) the words "defense counsel" should be changed to read "legal representation" in 2 places to conform with NATO.

(8) The following paragraph should be added as Paragraph 11 of the draft Protocol:

"11. In the event of hostilities in the Japan area either Japan or the United States shall have the right, by giving 60 days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, Japan and the United States shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended."

COMMENT: The above paragraph is similar to Article XV of the

CONFIDENTIAL

- 3 -

jurisdiction provisions of the NATO agreement. Consequently, in accordance with the first paragraph of Article XVII of the Administrative Agreement, the above paragraph should be included in an agreement with Japan on criminal jurisdiction.

- (9) The paragraph on the effective date of the protocol should be deleted and the following paragraph substituted:

"The present Protocol shall come into effect on the date of its signing".

CONFIDENTIAL

5/21/53

CONFIDENTIAL

Proposed State Defense Draft of May 21, 1953

OFFICIAL MINUTES REGARDING  
PROTOCOL TO AMEND ARTICLE XVII  
OF THE ADMINISTRATIVE AGREEMENT

Re Paragraph 1(b) and Paragraph 2(b)

The scope of persons subject to the military law of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re Paragraph 2(c)

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re Paragraph 3(b)

It is understood that as part of the normal cooperation between allies, the authorities of a force will decide as to whether or not an offense has been committed in the course of official duty.

Re Paragraph 3(c)

COMMENT: The above minute is substantially the same as an understanding which forms part of the record of the negotiation of NATO status of forces agreement.

Re Paragraph 3(c)

It is understood that the Japanese Government does not desire

CONFIDENTIAL

- 2 -

of the United States armed forces, the civilian component or their dependents, except in cases considered to be of particular importance to Japan. The United States armed forces will investigate any criminal offense alleged to have been committed by members of the United States Armed Forces, the civilian component, or their dependents which may be brought to their attention by the competent Japanese authorities or which the United States authorities may find to have taken place and to take appropriate punitive action with respect thereto. All persons who have been apprehended by the Japanese authorities and over whom the Japanese authorities have waived their primary right to exercise jurisdiction will immediately be transferred to the custody of the United States. Where a case is considered to be of particular importance to the Japanese Government they shall notify the United States authorities of their desire to exercise jurisdiction in the case. This notification shall be made in such form, by such authorities and within such time as the Joint Committee may prescribe.

Trials of cases in which the Japanese authorities have waived primary jurisdiction, and trials of cases involving offenses of paragraph 3(a)(ii) committed against the state or nationals of Japan shall be held promptly in Japan within a reasonable distance from

CONFIDENTIAL

- 3 -

other arrangements are mutually agreed. Representatives of the

Japanese authorities may be present at such trials.

Re Paragraph 10(a) and 10(b)

It is understood that the United States authorities will normally make all arrests within facilities and areas in use by the United States Armed Forces. Any person subject to the jurisdiction of Japan and arrested in any such facility or area will, upon request, be turned over to the Japanese authorities.

The United States authorities may, under due process of law, arrest in the vicinity of such a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States Armed Forces shall immediately be turned over to Japanese authorities.

It is understood that the Japanese authorities will normally not exercise the right of search or seizure with respect to any persons or property within facilities and areas in use by the United States Armed Forces or with respect to property of the United States Armed Forces wherever situated. At the request of Japanese authorities the United States authorities will undertake, within the limits of their authority, to make such search and seizure and inform the Japanese authorities as to the results thereof.

CONFIDENTIAL

-- 4 --

In the event of a judgment concerning such property, except property owned or utilized by the United States Government or its agencies, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

At the request of the United States authorities, the Japanese authorities will investigate any offense alleged to have been committed in violation of Japanese Law 138 (1952).

Re Paragraph II

The United States declares its intention, in the event of hostilities in the Japan area, other than the present hostilities in Korea, to seek exclusive jurisdiction over its forces in Japan.

COMMENT: The United States made a similar declaration of intention to seek exclusive jurisdiction in the event of hostilities at the time of the negotiation of the NATO status of forces agreement. This statement forms part of the record of the negotiation.

RE the effective date of the Protocol

The provisions of the Protocol shall not apply to any offenses committed before the effective date of the Protocol. Such offenses shall be governed by the provisions of Article XVII of the Administrative Agreement as it existed prior to the coming into effect of the

(Japanese draft transmitted to American Embassy in Tokyo on April 14, 1953 as enclosure to note of same date from Foreign Minister Okazaki to Ambassador Murphy)

CONFIDENTIAL

( Draft )

PROTOCOL TO AMEND ARTICLE XVII OF THE  
ADMINISTRATIVE AGREEMENT UNDER ARTICLE  
III OF THE SECURITY TREATY BETWEEN JAPAN  
AND THE UNITED STATES OF AMERICA

Whereas the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces", signed at London on June 19, 1951, is to come into force on                      , 1953 with respect to the United States of America; and

Whereas Japan desires to conclude with the United States of America an agreement on criminal jurisdiction similar to the corresponding provisions of the said Agreement in accordance with the provisions of Paragraph 1. of Article XVII of the Administrative Agreement, signed at Tokyo on February 28, 1952, under Article III of the Security Treaty between Japan and the United States of America;

Now the Governments of Japan and the United States of America have agreed that the existing provisions Article XVII of the said Administrative Agreement shall be abrogated and substituted by the



- 2 -

following provisions:

ARTICLE XVII

1. Subject to the provisions of this Article,

(a) the authorities of Japan shall have jurisdiction over the members of the United States armed forces or of the civilian component thereof and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

(b) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

2. (a) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces or of the civilian component thereof and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.

(b)

- 3 -

(b) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

(a) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over a member of the United States armed forces or of the civilian component thereof in relation to

(i)

- 4 -

- (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or of the civilian component thereof or a dependent;
- (ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction

jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The authorities of Japan and the military authorities of the United States shall assist each other in the arrest of members of the United States armed forces or of the civilian component thereof or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces or of the civilian component thereof or a dependent.

(c) The custody of a suspect member of the United States armed forces or of the civilian component thereof over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The authorities of Japan and the military authorities of the United States shall assist each other in the carrying out of all

necessary

- 6 -

necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The authorities of Japan and the military authorities of the United States shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions  
of

- 7 -

of this Article either by the authorities of Japan or by the military authorities of the United States and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces or of the civilian component thereof or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his

favour,

- 8 -

favour, if they are within the jurisdiction of Japan;

(e) to have defense counsel of his own choice for his defense or  
to have free or assisted defense counsel under the conditions  
prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a  
competent interpreter; and

(g) to communicate with a representative of the government of  
the United States and, when the rules of the court permit, to  
have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the  
United States armed forces shall have the right to police any facilities  
or areas which they use under Article 2 of this Agreement. The military  
police of such forces may take all appropriate measures to ensure the  
maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police  
shall be employed only subject to arrangements with the authorities  
of Japan and in liaison with those authorities, and in so far as such  
employment

- 9 -

employment is necessary to maintain discipline and order among the  
members of the United States armed forces.



- 10 -

The present Protocol shall come into effect on the date of the entry into force with respect to the United States of America of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces.

In witness whereof the representatives of the two Governments, duly authorized for the purpose, have signed the present Protocol.

Done at Tokyo, in duplicate, in the Japanese and English languages, both texts being equally authentic, this                      of                      , 1953.

For the Government of Japan:

For the Government of the United States of America: